

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

Oct 04, 2019

SEAN F. McAVOY, CLERK

UNITED STATES OF AMERICA,  
  
Plaintiff/Respondent,

v.

JOHN BERT HEATH,  
  
Defendant/Movant.

No. 2:15-CR-06013-EFS  
[No. 4:17-CV-05210-EFS]

**ORDER DENYING CONSTRUED  
MOTION FOR  
RECONSIDERATION AS  
UNTIMELY**

Before the Court is Defendant/Movant John Bert Heath's construed Motion for Reconsideration. ECF No. 76. Mr. Heath requests leave to amend his existing 28 U.S.C. § 2255 Motion to amend "inaccurate information." *Id.* Mr. Heath has filed the instant Motion after this Court dismissed as untimely Mr. Heath's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255, ECF No. 59, and dismissed Mr. Heath's Motion for Reconsideration, ECF No. 63. For the following reasons, Mr. Heath's Motion is dismissed as untimely.

As explained in the Court's prior Orders, ECF Nos. 60 & 62, pursuant to Rule 4(b) of the Rules Governing Section 2255 Proceedings for the United States District Courts, the Court must examine a § 2255 motion and the record to determine whether summary dismissal is warranted. Importantly, a defendant must file a § 2255 habeas petition within one year of the latest of:

- (1) the date on which the judgment of conviction becomes final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the

- 1 United States is removed, if the movant was prevented from  
2 making a motion by such governmental action;  
3 (3) the date on which the right asserted was initially recognized by  
4 the Supreme Court, if the right has been newly recognized by the  
5 Supreme Court and made retroactively applicable to cases on  
6 collateral review; or  
7 (4) the date on which the facts supporting the claim or claims  
8 presented could have been discovered through the exercise of  
9 reasonable diligence.

10 28 U.S.C. § 2255(f).

11 A district court's judgment becomes "final" for habeas purposes after the  
12 deadline to file a notice of appeal, which is 14 days after judgment is entered. *United*  
13 *States v. Gilbert*, 807 F.3d 1197, 1200 (9th Cir. 2015); Fed. R. App. P. 4(b)(1)(A).  
14 Accordingly, § 2255's one-year limitations period begins to run once a defendant's  
15 right to appeal his final judgment expires. *Id.*

16 The one-year limitations period may be tolled if a defendant shows "(1) that  
17 he has been pursuing his rights diligently, and (2) that some extraordinary  
18 circumstance stood in his way' and prevented timely filing." *Holland v. Florida*, 560  
19 U.S. 631, 649 (2010) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 413 (2005)). A  
20 movant must show that the extraordinary circumstances "were the cause of his  
21 untimeliness" and that they were caused by an "external force." *United States v.*  
22 *Buckles*, 647 F.3d 883, 889 (9th Cir. 2011) (internal quotations and citations  
23 removed); *Waldron-Ramsey v. Pacholke*, 556 F.3d 1008, 1011 (9th Cir. 2009).  
24 "Oversight, miscalculation or negligence on [the movant's] part" preclude the  
25 application of equitable tolling. *Id.* (citing *Harris v. Carter*, 515 F.3d 1051, 1055 (9th  
26 Cir. 2008)).

1 Mr. Heath's judgment became final on December 1, 2015. ECF Nos. 52 & 54;  
2 *see* Fed. R. App. P. 26(a)(1). Accordingly, the § 2255 limitations period expired one  
3 year later, on December 1, 2016. *See* 28 U.S.C. § 2255(f). Mr. Heath filed his § 2255  
4 motion December 18, 2017. ECF No. 59. Mr. Heath has not informed the Court of  
5 any "extraordinary circumstances" that prevented him from filing his § 2255 motion  
6 within the one-year limitation period. *See Holland*, 560 U.S. at 649. Nor has he made  
7 any other showing why his motion is timely. As such, and for the reasons stated in  
8 the Court's prior order, ECF No. 62, Mr. Heath's motion is denied as untimely.  
9

10 Accordingly, **IT IS HEREBY ORDERED:**

- 11 1. Defendant/Movant John Bert Heath's construed Motion for  
12 Reconsideration, **ECF No. 76**, is **DENIED**.
- 13 2. This file and the related civil file, No. 4:17-CV-05210-EFS, shall  
14 remain **CLOSED**.
- 15 3. The Court **DECLINES** to issue a certificate of appealability. *See* 28  
16 U.S.C. § 2253(c)(2).  
17

18 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this Order and  
19 provide a copy to the United States Attorney's Office for the Eastern District of  
20 Washington and to Mr. Heath.  
21

22 **DATED** this 3<sup>rd</sup> day of October 2019.

23  
24 s/Edward F. Shea  
25 EDWARD F. SHEA  
26 Senior United States District Judge